Supreme Court, U.S.
FILED
JUL 28 2002

No. 01-6978

IN THE

# Supreme Court of the United States

GARY ALBERT EWING,
*Petitioner*,

v.

THE STATE OF CALIFORNIA,
*Respondent.*

**On Writ of Certiorari to the Court of Appeal for the State of California Second Appellate District**

## JOINT APPENDIX

QUIN DENVIR *
Federal Defender
DAVID M. PORTER
Assistant Federal Defender
801 K Street, 10th Floor
Sacramento, CA 95814
(916) 498-5700

KARYN H. BUCUR
24881 Alicia Parkway, # E-193
Laguna Hills, CA 92653
(949) 472-1092

*Attorneys for Petitioner*

* Counsel of Record

BILL LOCKYER
Attorney General of the State of California
DONALD E. DENICOLA *
Deputy Attorney General
300 South Spring Street
Los Angeles, CA 90013
(213) 897-2388

*Attorneys for Respondent*

PETITION FOR CERTIORARI FILED OCTOBER 3, 2001
CERTIORARI GRANTED APRIL 1, 2002

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*Please Note*: The Decision of the Court of Appeal of the State of California, Second Appellate District, Division Six, dated April 25, 2001, is attached as Appendix 1 to the Petition for Writ of Certiorari filed on October 3, 2001.

The Order Denying the Petition for Review in the California Supreme Court on July 11, 2001, is attached as Appendix 2 to the Petition for Writ of Certiorari filed on October 3, 2001

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

| DATE | PROCEEDINGS |
|---|---|
| 4/10/2000 | Information filed in the Superior Court of the State of California, County of Los Angeles, in case number YA043550. |
| 6/14/2000 | Jury Verdict filed finding petitioner guilty of grand theft in violation of California Penal Code section 487(a) as charged in count one of the Information. |
| 8/3/2000 | Trial Court sentenced petitioner to twenty-five years to life under California Three Strikes Law. |
| 8/8/2000 | Petitioner filed Notice of Appeal from the Judgment. |
| 4/25/2001 | Opinion issued by the California Court of Appeal, Second Appellate District, Division Six, affirming the judgment. |
| 7/11/2001 | Petition for Review denied by the California Supreme Court. |

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

PROBATION OFFICER'S REPORT

[Filed Aug 03, 2000]

| Defendant's Name(s) | | |
|---|---|---|
| Gary Albert Ewing | | |
| Address (Present/Release) | | |
| 1310 West 220th Street, Apt. #10<br>Torrance, Ca 90501, (310) 328-8932 | | |
| Birth date<br>10-11-62 | Gender<br>Male | Race<br>Black |
| Citizenship Status<br>United States | Drivers License/exp. Date<br>A6322587-Expired | |
| Probation No.<br>X-232125 | CII No.<br>A09025292 | Main No.<br>1456996 |
| Days in Jail this Case<br>☒ Estimated ☐ Verified<br>29 | Custody Status/Release Date<br>County Jail<br>- | |
| Booking No.<br>6390571 | | |

| Court<br>SW-C | Judge<br>Hollingsworth | Court Case No<br>YA043550 |
|---|---|---|
| Hearing Date<br>4-10-00 | Defense Atty.<br>PD | Prosecutor<br>DA |
| DPO<br>Tillis | Area Office<br>HAR/ING | Phone No.<br>(310) 419-5189 |

| Type Report | |
|---|---|
| _____ | Probation and Sentence |
| __x__ | Pre-Conviction (131.3 CCP) |



| | |
|---|---|
| _____ | Deferred Enty of Judgment |
| _____ | Post Sentence |
| _____ | Diversion (Specify)_____ |

PRESENT OFFENSE: LEGAL HISTORY

| Charged with the crimes of (Include Priors, Enhancements or Special Circumstances) |
|---|
| 487 Penal Code (Grand Theft) Count 1 |
| 459 Penal Code (Burglary) Count 2 |
| Further Allegations: 667.5 (B) Penal Code, 1170.12(A)-(D) Penal Code, 667(B) Penal Code. |

| Convicted of the crimes of (Include Priors, Enhancements or Special Circumstances)<br>N/A | | |
|---|---|---|
| Convicted By | Date of Referral<br>3-27-00 | Count(s) Continued to P&S for Disposition |

| Proposed Plea Agreement | Sources of Information<br>Referral |
|---|---|
| Date(s) of Offense<br>3-12-00 | Time(s)<br>0825 Hours |

| Defendant (See Prior record Section) | Holds |
|---|---|
| ☐ N/A ☐ Sentenced to State Prison/County Jail on Case____<br>☐ On Probation ☐ Pending Probation Violation<br>☐Pending New case<br>☒ On Parole Remaining Time 6/26/02 | ☒ Yes ☐ No<br>(CDC) |
| | |
| Recommendation:<br>☐ Probation ☒ Denial ☐ Diagnostic Study ☐ CYA ☐Other ____<br>☐ County Jail ☐ 707.2 WIC<br>☒ State Prison ☐1203.03 PC | |

PRIOR RECORD: SOURCES OF INFORMATION
(this page)
FBI, CLETS.

AKA'S:
ANTHONY G. WALLACE.

JUVENILE HISTORY:

Information Is Not Available Through Probation Department Inquiry Five Years After Juvenile Probation Activity Has Terminated.

ADULT HISTORY:

11-12-84 Columbus Police Department (Ohio) - Defendant Charged With Grand Theft. On 12-26-85, Defendant Convicted, Granted Three Years Probation, Jail Suspended, Ordered To Pay A Fine of $300.

9-9-88 Los Angeles Sheriff's Office - 487 Penal Code (Grand Theft). On 11-7-88 Torrance Superior Court, Department SW-G, Defendant Pled Guilty To Case A925352, Convicted, Proceedings Suspended, Defendant Was Granted Three Years Formal Probation And Ordered To Spend One Year In County Jail.

2-25-90 Long Beach Police Department - 666 Penal Code (Petty Theft With A Prior). 9-17-90 Defendant Convicted In Long Beach Municipal Court On Case 90M03784, Defendant Granted Three Years Probation And Ordered To Spend 60 Days In Jail. 2-26-93, Probation Was Terminated Pursuant To Section 1203.3 Penal Code.

7-10-92 Torrance Police Department - 242 Penal Code (Battery). On 8-26-92, Torrance Municipal Court,



Defendant Convicted On Case 92M07646, Defendant Granted Two Years Summary Probation And Ordered To Spend 30 Days In County Jail.

8-13-92 Los Angeles Police Department - 484 Penal Code (Theft). On 8-14-92, In Los Angeles Municipal Court, Defendant Was Convicted On Case 92R16540, Defendant Granted 12 Months Probation And Ordered To Spend Ten Days In County Jail.

1-9-93 Seal Beach Police Department - 459 Penal Code (Burglary), 148.9 Penal Code (Obstruction Of Justice). On 1-12-93, In Westminster Municipal Court (Orange County) Defendant Convicted On Case SBW251139P0 On Count 2, Defendant Granted One Year Summary Probation And Ordered To Spend 60 Days In Jail.

2-24-93 Los Angeles Sheriff's Office - 11364 Health And Safety Code (Possession Of Drug Paraphernalia). On 2-26-93 Bellflower Municipal Court, Defendant Convicted On Case 93M00860. Proceedings Suspended, Defendant Granted Three Years Probation And Six Months In County Jail. Probation Is Scheduled To Expire On 2-25-96.

7-29-93 Long Beach Police Department - 666 Penal Code, Count 1; 484 Penal Code, Count 2. On 9-13-93, Defendant Convicted On Case 93M04494, Case Heard In Long Beach Municipal Court, Defendant Convicted Of The Charge Of 485 Penal Code (Appropriate Lost Property), Defendant Granted Two Years Summary Probation And Ordered To Spend Ten Days In County Jail. This Probation Grant Expired On 9-12-95.

9-10-93 Long Beach Police Department - 12020 Penal Code (Possession Of A Firearm), 602.5 Penal Code (Trespassing). On 9-22-93, Long Beach Municipal Court, Defendant Convicted Under Case Number 93M05478, Defendant Granted One Year Probation And Ordered To Spend 30 Days In County Jail.

12-9-93 Long Beach Police Department - 212.5 Penal Code (Robbery), 459 Penal Code (Burglary). On 3-8-94, Matter Heard In Long Beach Superior Court, Department 30-L. Defendant Convicted On Case NA018343, Defendant Found Guilty By Jury, Probation Denied, Defendant Sentenced To Nine Years In State Prison.

(Defendant Was Received By The Department Of Corrections Under The California Department Of Corrections Number J-15228. Department Of Corrections Records Indicate The Defendant Was Paroled From State Custody On June 26, 1999.)



| | |
|---|---|
| Case Number: | YA043550 |
| Case Name: | People vs. Gary Ewing |
| Torrance, California | Thursday, August 3, 2000 |
| Department No. TO6 | Hon. Deanne Myers, Judge |
| Reporter: | Christine Cheatham, CSR. No. 2350 |
| Time: | 10:20 A.M. |

APPEARANCES:

(Appearances As Heretofore Noted.)

[1501] THE COURT: Let me call Gary Ewing.

MS. LINK: Deputy District Attorney Jodi Link on behalf of the People.

MS. BRISTO: Gail Bristo on behalf of Mr. Ewing who is present.

THE COURT: Mr. Ewing, The matter is here today for your sentencing on count 1. Hold on just one moment.

All right. I previously—I was just checking the date. July 18 there was a court trial as to the priors. The prior allegations were found to be true. We continued it over to today simply for sentencing.

Mr. Ewing, I want you to know your attorney has submitted a number of letters on your behalf including one from Henry Gutierrez, of the sheriff's department. Actually I guess two letters from him.

MS. BRISTO: Yes. I believe they basically reference the same things.

[1502] THE COURT: Right.

MS. BRISTO: He has two additional letters. One he wrote and a letter from a chaplain.

THE COURT: I have a letter from Anthony Williams that I reviewed and a Mary V-I-G-I-L, Mary Vigil, a number of letters from Rebecca Coon.

MS. BRISTO: If I could approach with the other two letters.

THE COURT: All right.

MS. BRISTO: One is from Mr. Ewing himself.

The Court: All right. I received two other letters. I'll take a moment to read them but I want the record to also reflect that I just told both counsel this, I have reviewed the court file in his previous case, NA018343.

There are a number of items in that file that I have reviewed and reviewed the appeal, the facts of the case, a letter from the Department of Corrections, et cetera. Is he ready to proceed for sentencing?

MS. BRISTO: Yes, your honor.

THE COURT: Does he waive arraignment for sentencing, any legal reason that sentence cannot be imposed?

MS. BRISTO: Waive further arraignment. No legal cause.

THE COURT: All right. Let me review these letters first then I will hear from each of you and we will proceed. Just a moment.

[1503] (COURT READS THE LETTERS.)

THE COURT: Mr. Ewing, I reviewed the letter you wrote as well as the letter from Catholic Jail Chaplain Moen I believe is his name.

All right. Anything either counsel wishes to say? Ms. Bristo.



MS. BRISTO: Yes, your honor. I just have two motions. One to reduce pursuant to 17b to a misdemeanor. The nature of the charge is grand theft, it's a wobbler. There also would be a motion to strike an appropriate number of strikes pursuant to 1385 and as to 2, I just request to be heard at the same time.

Note that the nature of the present offense is non violent, the theft of three golf clubs. I believe the value total is in the area of a thousand dollars. I also note with regard to his priors, I reviewed some of his file. The priors consist of two residential burgs, second degree—two residential burglary convictions, residential robbery conviction, and another residential burglary conviction.

I would note that of the four strikes, two would be non violent. That would be the two residential burglaries that did not involve the use of a knife.

With regard to the other two, it's the same incident from my reading of the complaint. The residential robbery of a victim by the name of Steven Jordan, [1504] I believe count 1 and 2 of the prior case.

Although that incident does involve actual violence, the other two convictions involve felonies of a serious nature as opposed to a serious and violent nature.

THE COURT: Wasn't one of them—one of the residential burglaries a nighttime burglary where somebody was present? This is maybe the woman woke up and the wine bottle was there and they took fingerprints.

MS. BRISTO: I don't know. I wouldn't know.

THE COURT: I think so.

MS. BRISTO: Certainly in reviewing it, I am not minimizing the seriousness of the nature of the offense, the third strike law certainly is designed to encompass serious felonies also but I think one of the big concerns is violence

with regard to Mr. Ewing's history and this includes all convictions for anything.

The history of his convictions for violence involves the first two counts of that complaint. This would be the one where the knife was alleged, would be my position, actual violence. The use of a knife would be considered actual violence with somebody present. My understanding from reading that, that is counts 1 and 2, that was the same incident.

THE COURT: Okay.

MS. BRISTO: With regard again to the rest of his history, he does have quite a few theft convictions, misdemeanors. He may have one of the—a felony theft conviction. I believe this would be his third felony [1505] case. He has been to prison one time and that was for the events that are the strike convictions.

Again with regard to factors as they relate to Mr. Ewing, as the court is aware from reading the prior file, during his commitment for the strike offenses he did apparently become very ill. At the time that that happened a letter was sent to the court suggesting he was terminally ill. He did recover as the court would be aware, he is here, although the information in that report I think the court indicated made some reference to the fact he wouldn't be able to commit any further crimes under the circumstances at that time. I am sure it was quite apparent. Fortunately he did recover.

THE COURT: I will not dispute what they say.

MS. BRISTO: Right. With regard to sentencing, I think one factor the court can consider in deciding whether they would be able to strike strikes would be would the interest of society be met by any alternative terms of commitment. Age is a factor that can be considered. Although Mr. Ewing is only 38, I suggest to the court in terms of his health, at the



time of the prior offenses he wasn't in the condition of full blown AIDS. To our knowledge this was diagnosed sometime while he was in prison. I am not sure of when he actually contracted the disease. The disease resulted in him becoming blind in one eye. I recall looking at the weights of him at the time he was incarcerated on that case and now I think he is a little bit smaller man but my position would be [1506] although he is still a younger man, because of the condition he is in and because of his past, the likelihood of him committing violent offenses in the future is minimized and I don't think he would be a threat in the future.

I note with regard to the priors that they occurred within a short period of time. They are on one case although with res burgs they are a little bit distinct in it has to be a separate act. In most—other than count 1 and count 2, there would be two—three separate acts.

THE COURT: Three separate dates apparently within a month, but three separate dates.

MS. BRISTO: This occurred during a short period of time in his life with regards to the strike period of three months and again the rest of his life, although it does reflect theft convictions, it doesn't reflect this type of possibly violent offenses.

With regard to the letters that have been submitted, I would argue to the court that one of the factors you consider is his prospects upon release, whenever that may occur.

It does appear from the number of letters he has—he does have support, that there is support for him in the area of getting into programs that might benefit him. One of the letters refers to the possibility of him being an AIDS advocate where he could speak to others about some of the tragedy that could befall them in [1507] addition to the disease if you were not to basically take care of the things you take care of.

As indicated in the letter, in the past cases his underlying problem does seem to be drug related. My recollection looking through his record, he has never actually received any assistance for that and that can be a factor although it doesn't mean he gets a program or anything like that necessarily. It can be a factor that somebody has been through the system. On several dates he never actually received any treatment. The court could consider that in mitigation, consider whether to strike the strike.

I just request based on everything that this is not the type of case where the interests of society are best served by giving Mr. Ewing a life sentence.

THE COURT: Ms. Link.

MS. LINK: People respectfully disagree. To argue that the defendant has only four strike priors which are residential burglary and residential robbery with use of a weapon and since that time he has not, to his credit, I guess, picked up any new violent felonies, he was only out of custody for seven months between the time he was paroled from that case and the time that he committed this new offense. So people don't find that argument is persuasive in the least.

He has had ten convictions in his lengthy criminal history for someone as young as he is, being only 38, five of which have been felonies. He has repeatedly [1508] been placed on probation. He has repeatedly failed miserably at probation. He goes to state prison, he gets paroled. He fails miserably on parole.

People do not find there is anything redeeming that should warrant the court to strike his very serious and very violent strikes. We would ask for the sentence to be imposed as 25 to life. He has certainly, out of all this time, earned that sentence.

THE COURT: All right. Anything from Mr. Ewing at all?



THE DEFENDANT: Yes, your honor. I would just like to beg the mercy of the court asking that any sentence I be given be suspended and I'm given a chance in a drug rehab to get my life together. I don't have very long and the little time I do have left to live I want to do something, make myself better. I am—when I came home everything hit me at one time and I left the drug rehab, you know. What really hit me was the loss of my mother, my brother. My family wasn't there. It was because of my disease and they drove me to doing drugs.

Again all I am asking for is to spare—suspend my sentence, give me a chance to get into a program and get the help that I need.

THE COURT: Okay. Anything else, Ms. Bristo, before sentence is imposed?

MS. BRISTO: No, your honor.

THE COURT: Mr. Ewing, let me first indicate to you as follows.

[1509] Because of the nature of this offense, you know, I have reviewed your prior file, I reviewed it carefully anticipating there would be a motion to strike certain—some of the strikes.

How much—the real test is whether you are outside the spirit and the intent of the three strikes law and it may be a harsh law in that the charge that you're convicted for is non violent but I cannot, based upon your record, and let me just tell you the two principle factors are one, that you have convictions, some of them are misdemeanors, but basically almost consistently from 1988 for the first felony theft until 1993 when you committed the strike offenses, I mean that is a period of basically five years, and there were nine convictions more or less, almost consistently. Mind you, some of them were misdemeanors, but they were all theft cases and until we get to the strikes there was a battery and there was—and I

recognize that those may be non violent, but nonetheless there is just consistent criminal activity. Maybe it is based upon a drug problem, but I don't think that kind of a record takes you outside the spirit and the intent of the three strikes law.

Then I think the other factor that is of terrible concern, and again I cannot find that you're outside the spirit and the intent of the law which is harsh, that is the law, is that you were paroled in June of 1999 and this offense is committed in March. I mean you have hardly even—you have hardly been out of the [1510] state prison and it may be because of—drugs may be sort of the reason for these continued offenses but nonetheless it does not present someone who should be outside the spirit and the intent of the law.

So I have given a great deal of thought to it because the nature of the current offense is one that one does think about it, but as I say, your record and the timing of when you're released on parole and this offense occurs, is just such that I think there is no way I could find, which is what I am required to find, you are outside the spirit and the intent. I do have to consider threats to the community and although there isn't a real pattern of violent crimes that you pose a threat, you are clearly posing a threat for theft offenses. So clearly I mean it's just—the record just screams out for that. And it's for that reason that I cannot consider and will not strike any of the strikes.

I am going to impose the required sentence which is life with a minimum of 25 years. Let me ask both counsel, I do believe and I did not have a chance to look at this, I do believe I have the authority not to impose an additional year because of the 667.5 conviction. Does everyone concur with that?

MS. LINK: Yes.

MS. BRISTO: Yes.



THE COURT: I feel that his record—because that is a strike conviction, is also the one for which he served the prison time. To impose anything further would [1511] be out of bounds basically.

So, Mr. Ewing, you were found guilty by the jury on Count 1. You were found not guilty on Count 2. I did find true the prior strike convictions and also the prison prior pursuant to 666.5(b) therefore on count 1 the sentence will be as follows. you are going to be sentenced to state prison for a period of life with a minimum of 25 years.

As you know, you will be required to serve 80 percent. You're only eligible for 20 percent conduct credits.

What sort of credits does he have to date, Ms. Bristo?

MS. BRISTO: I was adding them up.

THE COURT: While you're doing that, I am going to impose a $200 restitution fine, a parole revocation fine of $200 that will be stayed. You understand that if and when you are released you will be placed on parole for a period of five years, not a three year period because of the life term, correct, counsel? I believe it's a five year parole period. I am aware of your health issues so I don't know.

MS. BRISTO: 144 days.

THE COURT: What sort of credit?

MS. BRISTO: 144 actual.

THE COURT: You're going to receive 144 plus 72 conduct credits for a total of 216 Days.

This will be forthwith to the Department of [1512] Corrections. I believe that concludes this sentence.

MS. BRISTO: His appeal rights. He will be filing an appeal.

THE COURT: Mr. Ewing, You do have a right to file a notice of appeal. Understand that on a notice of appeal if you cannot afford counsel the appellate court will appoint counsel for you. Ms. Bristo will assist you. She will assist you if you wish to file the notice of appeal. In order to appeal you must file a notice of appeal within sixty days of today's date, from sentence, and the notice is filed in this court. She will remain as counsel to assist you in filing the notice of appeal. All right.

(Proceedings concluded.)